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Supreme Court, U.S.
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No. 01-889

In the Supreme Court of the United States

PATRICIA S. CRAVEN,

Petitioner,

v.

UNIVERSITY OF COLORADO HOSPITAL AUTHORITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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QUESTION PRESENTED

Does a federal court of appeals impermissibly depart from the accepted and usual course of judicial proceedings by deciding an appeal on a ground not raised or argued by any of the parties in their appellate briefs?

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Patricia S. Craven respectfully submits this Reply Brief in support of her Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The University of Colorado Hospital Authority (hereinafter, "Authority") asserted in the brief it filed in opposition to the Petition for Writ of Certiorari in this case that, "rather than addressing the alleged errors in the jury instruction on the First Amendment claim, the Tenth Circuit Court of Appeals affirmed the trial court on another basis" (Reply Brief, at 2). That assertion is incorrect.

The Tenth Circuit *reversed* the district court's decision to submit Petitioner's claims to the jury. Specifically, that court concluded that none of the four categories of speech cited in Dr. Craven's opening brief in that court "can provide an adequate basis for her retaliatory discharge claim" (Pet. for Writ of Cert., App. B at 23a). After summarizing its more specific conclusions of law, that court then held:

> Accordingly, we hold that UH was entitled to judgment as a matter of law on Dr. Craven's § 1983 claim. *Because the § 1983 claim should never have been submitted to the jury*, the other five errors alleged in Dr. Craven's brief were harmless, and we need not address them.

(*Id.*) (emphasis supplied).

REASONS FOR GRANTING THE WRIT

The Authority's Brief is based entirely upon its contention that the Tenth Circuit has held that that court can

affirm a district court decision "on any grounds that find support in the record, provided the litigants have had a fair opportunity to develop the record ..." (Authority's Brief, at 4). The Authority claimed that Dr. Craven "has cited no legal authority in her Petition for Writ of Certiorari which stands for the proposition that it is inappropriate for a court of appeals to affirm a trial court on bases other than those raised by the litigants" (*Id.*, at 4-5). As a result, according to the Authority, Dr. Craven "has failed to establish a departure from the usual course of judicial proceedings and legal precedent," and therefore there is no basis for this Court to exercise its supervisory jurisdiction (*Id.*, at 5).

The Authority's argument fails to account for the fact that the Tenth Circuit in this case did not affirm the district court's decision on a ground other than that upon which that court relied. Instead, it reversed the district court's decision to submit Dr. Craven's First Amendment retaliatory discharge claim to the jury, and therefore held that any instructional errors alleged by Dr. Craven were harmless.

This is not a mere semantic distinction. In *Hernandez v. Starbuck*, 69 F.3d 1089, 1093-94 (10th Cir. 1995), *cert. denied*, 517 U.S. 1223 (1996) - a case upon which the Authority relied heavily - the Tenth Circuit distinguished among the roles of an appellant, an appellee and a court of appeals. While a court of appeals ordinarily will consider an argument not made by an appellant in that party's appellate briefs to be waived, "[a]ppellees bear no such burden." *Id.* at 1093. The court then reasoned:

> Though Fed. R. App. P. 28(b) requires the appellee's brief to contain arguments addressing the issues raised by the appellant, we have never characterized the appellee's

> obligation in terms of a categorical imperative. The distinction between appellant's and appellees' obligations under Rule 28 grows out of the court of appeals' freedom to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court. This broad power to affirm extends beyond the counter-arguments raised by the appellee; it includes any ground for which there is record to support conclusions of law. Once the appellant alleges the district court erred, we have a duty to assess the validity of the appellant's allegations. This duty arises in part out of our relationship with the district court, and we may not neglect it simply because an appellee fails to defend adequately the district court's decision. *To do so would open the door to a perverse jurisprudence by which properly decided district court decisions could be reversed.*

Id. at 1093-94 (emphasis supplied; citations and internal quotation marks omitted).*

That court then used the facts in that case to demonstrate its point. It concluded that it should not reverse the district court's decision that the appellant had failed to exhaust state remedies with respect to his ineffective

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* The Authority did not quote the last two sentences from that paragraph, even though it quoted from portions of that paragraph that preceded those sentences.

assistance of counsel claim – a decision that the appellant had conceded to be correct – merely because the appellee had failed to make that argument on appeal. *Id.* at 1094. "Mr. Hernandez is asking us to reverse the district court while simultaneously conceding the court decided the issue properly. We cannot endorse a rule of law allowing such anomalous and contradictory results." *Id.*

This case presents precisely the opposite scenario. The Tenth Circuit did not hold that the district court's decisions on Dr. Craven's First Amendment retaliation claim were correct. Instead, the Tenth Circuit held that the district court had committed reversible error by submitting that claim to the jury. And it did so without advising the parties in advance that it would be considering that matter and without providing them an opportunity to address the legal issues upon which it decided its appeal concerning that claim.

Even assuming *arguendo* that the Tenth Circuit effectively affirmed the district court's decision in this case, that does not necessarily mean it followed the accepted and usual course of judicial proceedings. As that court held in one of the decisions the Authority cited, an appellate court can affirm a district court decision on any grounds that find support in the record if and only if "the litigants have had a fair opportunity to develop the record." *Seibert v. State of Okla., ex rel. Univ. of Okla. Health Sciences Ctr.*, 867 F.2d 591, 597 (10th Cir. 1989).

In each of the Tenth Circuit cases cited by the Authority, the parties had been provided with fair notice that that court could base its decision on the grounds upon which it eventually relied. In *Seibert*, that court decided the legal merits of the plaintiff's claim for relief in an appeal from a decision dismissing that claim. *Id.* at 596-97. In *Griffith v.*

State of Colo., Div. of Youth Svces., 17 F.3d 1323, 1328 (10th Cir. 1994), that court affirmed the district court's decision not to award attorney fees to a prevailing party in a Title VII case on the basis of this Court's decision in *Farrar v. Hobby*, 526 U.S. 103 (1992), after the parties had been given an opportunity to address *Farrar* in their appellate briefs. And in *State Ins. Fund v. Ace Transp. Inc.*, 195 F.3d 561, 564 (10th Cir. 1999), it is not even clear that the Tenth Circuit affirmed the district court's decision on a ground not raised on appeal. Instead, that court affirmed the district court's conclusion that the Fund's one-third rule applied to the owner-operator arrangement described in that case, *Id.* at 565-66, but reversed the district court's decision about how that rule had been calculated for that defendant. *Id.* at 566-67.

Similarly, in *Blum v. Bacon*, 457 U.S. 132 (1982), this Court affirmed a decision by the Second Circuit which had invalidated provisions in the New York State Emergency Assistance Program on constitutional grounds. *See id.* at 136. This Court's affirmance, however, was based on statutory grounds, *Id.* at 139-45, even though the respondent had not made a statutory argument in this Court. *Id.* at 137 n. 5. In doing so, this Court noted that the statutory issue had been raised and decided in both the district court and in the court of appeals.

The grounds upon which this Court affirmed the Second Circuit in *Blum*, and the grounds upon which the Tenth Circuit affirmed the district court decisions in the cases cited by the Authority, all were subsumed within the arguments the parties had raised on appeal. That practice is well accepted in our jurisprudence, and does not offend fundamental principles of due process. If a lower court has decided a legal issue correctly, albeit for the wrong reason, an

appellate court has the authority to affirm that decision on a ground not raised by the appellee.

What happened here is that the parties had filed extensive summary judgment briefs on whether Dr. Craven's speech involved matters of public concern and on whether the balancing test this Court established in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), favored the Authority or Dr. Craven. The parties did not submit those briefs to the Tenth Circuit in the appendices to their appellate briefs. Instead, the court of appeals had only the oral arguments the parties made to the district court when the Authority raised those issues in its motions for judgment as a matter of law during the trial. And it had a copy of the full trial court transcript only because the Tenth Circuit has held that a party must file the complete trial transcript in order for that court to review an argument of instructional error. *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1237-38 (10th Cir. 1999).

Dr. Craven did not have a "a fair opportunity to develop the record," *Seibert*, 867 F.2d at 597, in the court of appeals. She could not reasonably have anticipated that that court would search the trial transcript, submitted for a totally different reason, for a basis to reverse the district court on an issue neither of the parties had raised or briefed on appeal. The Authority has cited no case in which the Tenth Circuit, or for that matter any other appellate court in this country, has decided a case by that technique. This Court should exercise its supervisory authority to review the Tenth Circuit's abuse of and disregard for standard and accepted appellate practices in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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